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REGARDING

"WHAT PRICE FREE SPEECH?: WHISTLEBLOWERS AND THE CEBALLOS DECISION"

ON

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Mr. Chairman and Committee Members: My name is Joe Goldberg, and I am Assistant General Counsel for Litigation for the American Federation of Government Employees, AFL-CIO (AFGE). I appreciate the opportunity to testify at today's hearing regarding the current state of whistleblower protections that many of the over 600,000 federal employees represented by AFGE depend on to provide protection when they report wrongdoing and excessive waste. I will also discuss the limitations the courts have placed on whistleblower rights, the numbers of federal employees who are excluded from whistleblower protections, and how active oversight of the Office of Special Counsel is imperative to federal employees. AFGE firmly believes that Congress should continue the work it has begun to ensure that disclosures made by public employees reporting fraud, waste, and abuse are protected.

Ceballos has a limited impact on federal workers.

The Supreme Court's decision in **Garcetti v. Ceballos**, 547 U.S. ___ (2006) has brought much needed attention to the obstacles public employees who blow the whistle on wrongdoing encounter. However, AFGE's analysis is that this case does not greatly impact most government workers. The Ceballos decision is limited to public employees whose communications are unprotected by statute. The court held "that when public employees make statements pursuant to their official duties," the employees are not protected by the First Amendment. For example, if an employee's job is to report safety hazards to a supervisor, these reports are not protected from employer retaliation by the First Amendment. On the other hand, this case does not apply to statements made outside of an employee's duties. If the same employee instead disclosed safety hazards to the public, these communications would be protected by the First Amendment.

This case does not change statutory protections, such as the Whistleblower Protection Act (WPA) and labor laws. In fact, the Supreme Court specifically noted in this opinion:

> The dictates of sound judgment are reinforced by the powerful network of legislative enactments—such as whistle-blower protection laws and labor codes—available to those who seek to expose wrongdoing. See, *e.g.*, 5 U.S.C. §2302(b)(8).

In Ceballos, the employee was not in a job covered by federal whistle-blower laws. His only possible protection was the First Amendment. Fortunately, most AFGE members are covered by whistleblower laws designed to protect federal civil servants. Ceballos does not change this protection, nor does it change the protection enjoyed by union officials when speaking in their role as union officials, or employee rights via the grievance process of any other statutory protections of speech.

Whistleblower protection law and its limitations in protecting federal employees.

The main statutory protection covering whistleblowers is the WPA, set forth is 5 U.S.C. §2302(b)(8), which forbids federal agencies from:

> Engage(ing) in reprisal for whistleblowing i.e….any disclosures of information by the employee or applicant that he or she reasonably believes evidences a **violation of a law, rule or regulation; gross mismanagement; gross waste of funds; an abuse of authority;** or a substantial and specific **danger to public health or safety.**

According to this statute, the employee must prove that she or he made a protected disclosure and that management took a personnel action in retaliation for the disclosure. Huffman v. Office of Personnel Management, 263 F. 3d 1341 (Fed.Cir. 2001). The scope and implementation of these whistleblower laws is a matter of great concern. In Huffman and other cases the Federal Circuit Court of Appeals has interpreted whistleblower protections very narrowly.

The decision in Ceballos will have far less of an effect on whistleblower policy than judicial interpretation of the WPA that has weakened its effectiveness at protecting employees who come forward to report wrongdoing. Judicial decisions have limited protection for many disclosures. Communications made as a part of an employee's **normal duties are not protected.** Id. At 1354. However, if an employee reports wrongdoing outside of normal work channels, the disclosure can be protected. Id. In addition, the Federal Circuit ruled in Huffman that communications to the wrongdoer are not protected. For example, if a supervisor is doing something illegal or grossly wasteful, an employee's communications about this behavior to that supervisor are not protected. Also, communications entirely about whether specific activity is legal are not protected. Only if the communication reveals something previously unknown about the activity itself, can the communication be protected. For example, if the public knows that the agency is dumping trash in a river but does not know that this dumping is illegal, communications to the media stating that the dumping is illegal are not protected. However, if the public is not aware of the dumping and it is harmful to public health, communications to the media about the dumping might be protected.

Many of the loopholes in whistleblower protection were addressed by S. 494, the Federal Employee Protection of Disclosures Act which passed in the Senate as an amendment to the 2007 National Defense Authorization Act. The result of several years of bipartisan cooperation between the bill's sponsors, Homeland Security and Governmental Affairs Committee Chairman Susan Collins and ranking member Daniel Akaka, S. 494 is a comprehensive advancement of whistleblower rights. The bill applies WPA protections to "any" lawful

communication of misconduct. If enacted, the Federal Employee Protection of Disclosures Act would in part stop any potential application of the Ceballos decision to federal employees, open access to the courts for whistleblowers, give the Merit Service Protection Board (MSPB) the authority to hear cases when an employee alleges that their security clearance was revoked or suspended in retaliation for whistleblowing, and stops federal courts from creating requirements outside the scope of federal law before a federal employee is protected under the WPA. The legislation also allows whistleblowers to disclose classified information to Congress under certain conditions. AFGE calls upon Congress to retain this essential bill during the conference process so that it is enacted into law.

Remaining Issues in Whistleblower Protections: Transportation Security Officers, national security employees and the Office of Special Counsel.

Entire categories of federal employees are specifically excluded from most whistleblower protections. AFGE applauds this Committee for reporting out today H.R. 1317, the Federal Employee Protection of Disclosures Act, and taking the first step to restore whistleblower protections and a portion of the other rights currently denied over 42,000 Transportation Security Officers (TSOs) working in the Transportation Security Administration (TSA). Congress clearly intended that TSOs should be fully covered by whistleblower protections by originally requiring that the TSA adopt the FAA personnel system, which expressly incorporates Title 5 whistleblower protections, including provisions for investigation and enforcement. 49 U.S.C. §40222(g)(2)(A).

However, TSA has argued before the MSPB and the U.S. Court of Appeals that the FAA system and its whistleblower protections do not apply to TSOs due to a statutory note within the Aviation and Transportation Security Act (ATSA). Public Law 107-71. The footnote states that "notwithstanding any other provision of law," the TSA administrator may "employ, appoint, discipline, terminate, and fix the compensation, terms, and conditions of employment of Federal service for [airport screeners…and] shall establish levels of compensation and other benefits for individuals so employed." Public Law 107-71, §111(d). Without the intervention of Congress or the courts, TSA has failed to provide whistleblower protections to TSOs, and has disciplined and fired employees who had the courage to expose flaws in TSA management and airport screening operations.

Unlike other federal employees, TSOs do not have an individual right to appeal to the MSPB for an independent, neutral review of whether negative job actions were unlawful retaliation for protected disclosures. The provisions of H.R. 1317 ensure that TSOs can now bring those claims before the MSPB, the same right afforded to other DHS employees. TSA has taken the position that it is not bound by the Rehabilitation Act of 1973, and has fired and failed to hire persons with a disability (including diabetes and epilepsy) regardless of their actual ability to perform the duties of a TSO. If enacted into law, H.R. 1317 would also provide

TSOs protection from certain discriminatory practices, including discrimination on the basis of an actual or perceived disability. However, H.R. 1317 does not address the other rights denied TSOs, including the other prohibited practices of 5 U.S.C. §2302(b). TSA has refused to recognize the right of TSOs to join unions, the veterans' preference or to follow the policies of the Office of Personnel Management as do other federal agencies. TSOs face disciplinary action—up to termination--for merely taking approved leave. TSOs are on the front line of protecting the public in the most-used forms of transportation including travel by air and rail, and the time is long overdue to restore the labor rights Congress intended that they enjoy. AFGE calls upon Congress to immediately enact legislation restoring full rights to TSOs

In addition to TSOs, federal employees specifically excluded from the Whistle-blower Protection Act include uniformed military personnel in the Armed Forces, and employees of the Central Intelligence Agency, the Defense Intelligence Agency, the Defense Mapping Agency, the Federal Bureau of Investigation, the Government Accountability Office and the National Security Agency. Because these employees do not have a right to third-party review of their complaints of retaliation for disclosures of illegal activities or waste, the very agency the employee accuses of retaliation stands as sole arbiter of its own actions. For national security whistleblowers, the ultimate act of retaliation is revocation of the employee's security clearance. Once they have lost their security clearance, an employee's career within an agency is over, and other job opportunities are placed in jeopardy.

Congress must act to extend whistleblower protections to national security workers by enacting legislation such as S. 2285, the Whistleblower Empowerment, Security and Taxpayer Protection Act, introduced by Senator. Frank Lautenberg in the Senate, and H.R. 5112, the Executive Branch Reform Act of 2006, introduced by Ranking Member Henry Waxman, House Government Reform Committee and Federal Workforce and Agency Organization subcommittee Ranking Member Danny Davis. Both bills extend whistleblower protections to employees of the FBI and other intelligence agencies and broaden access to jury trials for federal employees. This Committee's approval of H.R. 5112 in April of this year was a great step in the right direction for whistleblower policies. AFGE looks forward to working with Congress to ensure that these two bills are enacted into law.

Since 2004, the head of the OSC, Scott Bloch, has taken numerous steps to thwart the rights of federal employees and trample on the rights of his own employees at OSC. In April 2004, Bloch, the principal protector of federal civil service rights and federal whistleblowers, sent a gag order to his own staff which likely violates the Whistleblower Protection Act. The order stated that "the Special Counsel has directed that any official comment on or discussion of...sensitive internal agency matters with anyone outside OSC must be approved in advance…" Bloch also forbade his staff from discussing anti-

discrimination policy with outsiders, including other federal employees and agencies asking for guidance. Corrective action for all prohibited personnel practices has dropped roughly by half over the last two years. AFGE believes there is a correlation between the steep decline in enforcement of whistleblower protections for federal workers and the actions of the head of the OSC.

Current policies of the OSC have caused serious harm to numerous federal employees. Our demand is simple: that the head of the OSC carry out the mission of the agency as required by law, including respecting the work of career staff with extensive experience in investigating whistleblower retaliation claims. Without the cooperation and good faith action of the OSC, whistleblower protection laws are rendered far less effective than Congress intended. Increased Congressional oversight of the OSC is vital to ensure the true intent of Congress—that federal whistleblowers be protected from retaliation—is a meaningful reality for federal workers.

Ceballos is the latest in a long series of judicial decisions that have greatly narrowed protections under the WPA. Even though Ceballos does not apply to federal employees, the chilling effect of yet another judicial decision weakening rather than strengthening whistleblower protections will take its toll as federal employees weigh whether disclosures of illegal activity and excessive waste are worth the risk of retaliation by supervisors that can range from making their work lives miserable to costing them their job and career. AFGE applauds the Committee for holding this hearing, and looks forward to working with both the House and Senate to enact laws that advance whistleblower protections.

That concludes my statement. I will be happy to respond to any questions.